



## RECENT ORDERS PASSED BY NATIONAL ANTI-PROFITEERING AUTHORITY (NAA) – AN ANALYSIS

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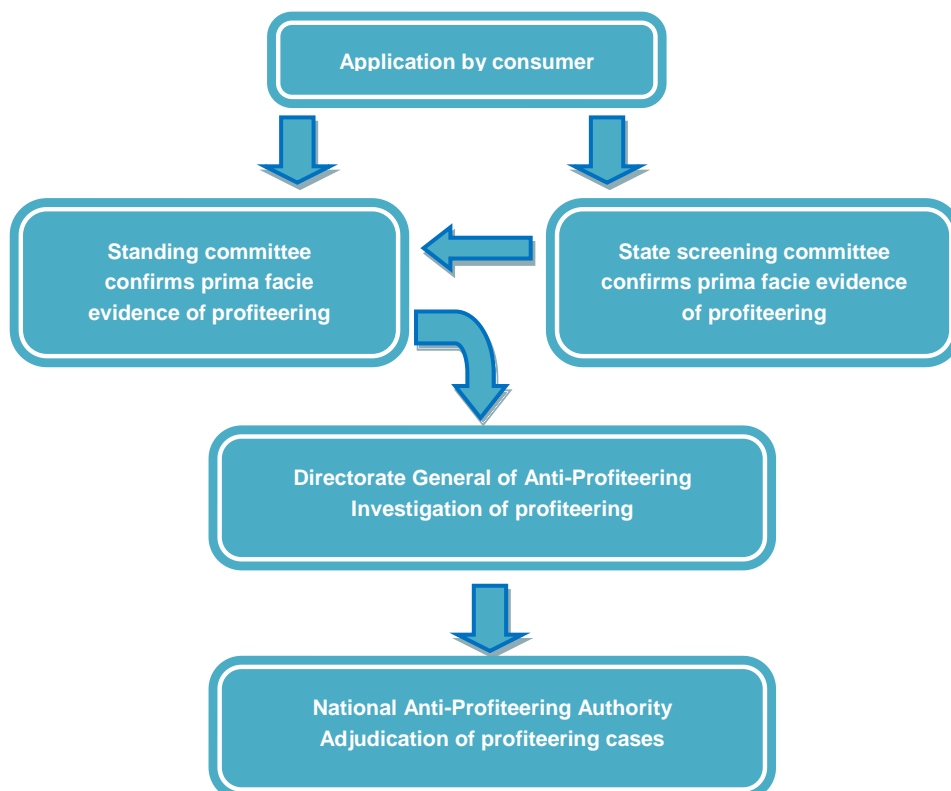
**Section 171(1)** of the CGST Act, 2017 stipulates that “**any reduction** in the **rate of tax** on **any supply** of goods or services or the **benefit of input tax credit** shall be **passed on** to the **recipient** by way of **commensurate** reduction in prices.”

**Section 171(2)** of the CGST Act, 2017 stipulates that “the **Central Government** may, on recommendations of the Council, **by notification, constitute** an **Authority**, or **empower** an existing Authority constituted under any law for the time being in force, **to examine** whether **input tax credits** availed by any registered person or **the reduction in the tax rate** have **actually resulted** in a **commensurate** reduction in the **price** of the goods or services or both **supplied** by him.”

**Section 171(3)** of the CGST Act, 2017 stipulates that “the **Authority** referred to in sub-section (2) shall **exercise** such **powers** and **discharge** such **functions** as may be **prescribed**.”

Important procedural details have been specified vide **rule 122 to rule 137** of the CGST Rules, 2017, inter alia includes, constitution of the Authority, constitution of the Standing Committee and Screening Committees, power to determine the methodology and procedure, examination of application by the Standing Committee and the Screening Committee, initiation and conduct of proceedings, confidentiality of information, cooperation with other agencies or statutory authorities, power to summon persons to give evidence and procedure documents, order of the Authority, compliance by the registered person, monitoring of the order etc.

The following flow chart will help us to understand the organisational structure:



At the time of penning down this article, so far nine orders have been published as passed by the Authority in their website ([www.naa.gov.in](http://www.naa.gov.in)). All the orders have been reviewed and are summarised below with key take away points from each order:

Sl. No	Name of the parties	Citation	Date of the Judgement																																	
1	Sh. Dinesh Mohan Bhardwaj Proprietor, M/S U.P. Sales ( <b>Applicant</b> ) Vs Services Versus M/S Vrandavaneshwree ( <b>Respondent</b> )	2018 (4) Tmi 1377 - The National Anti-Profiteering Authority	27-03-2018																																	
<b>Summary of Case No. 1/2018:</b>																																				
a. <b>Facts:</b>																																				
i. Applicant booked a car (Orchid White colour, model no. WR-V 1.2 VX MT (i-VTEC)) from showroom of the respondent, being a dealer of M/s. Honda Car Ltd, vide Sale Contract dated 28.04.2017 when the ex-show room price was ₹ 9,13,300/-.																																				
ii. Applicant requested for change in colour to Alabaster (base colour), had taken the delivery of the car on 11.07.2017 whose pre-GST show room price was ₹9,09,300/- , at ₹8,98,750/-.																																				
iii. Applicant had alleged that combined effect of rate of tax was 51% in pre-GST regime while the total incidence of tax in GST regime is 29%, i.e, there had been a reduction of rate of tax.																																				
iv. Thus applicant filed an application dated 01.11.2017 before the Standing Committee alleging that he was not given benefit of reduced rate of Tax (GST) which amounted to profiteering.																																				
v. Standing Committee considered the matter in it's meeting held on 07.11.2017 and referred to Director General of Safeguards (DGSG) for detailed investigation under rule 129(1) of the CGST Rules, 2017.																																				
b. <b>Issues:</b>																																				
i. Whether the rate of tax on the car had been reduced post-GST and if so, whether there was substantial reduction in the rate of tax as has been contended by the Applicant, and whether the benefit of reduction in rate of tax had been passed on to the applicant,																																				
ii. Whether any input tax credit (ITC) benefit was too be passed on to the Applicant by the Respondent.																																				
c. <b>Decision:</b>																																				
i. With regard to point no (i), from the detailed analysis of DGSG in it's report dated 23.02.2018, it is found that pre-GST rate of tax 51% was reduced to 29% in GST regime is factually in correct, instead there was a reduction of about 2%, i.e, from 31.254% to 29%. From the detailed calculation submitted by DGSG, it is found that the <b>benefit in reduction of tax rate</b> was passed on to the Applicant by way of <b>reduction</b> in the price of base colour by an amount of ₹10,550/-.																																				
ii. With regard to point no. (ii), as the <b>benefit of ₹10,550/-</b> on account of <b>reduction of tax</b> by about 2%, viz, from 31.254% (pre-GST) to 29% (in GST), has been <b>passed on</b> to the Applicant, <b>no additional benefit</b> on account of input tax credit (ITC) is <b>required</b> to be <b>paid</b> by the respondent.																																				
iii. Thus the <b>contention</b> of the <b>Applicant</b> made in his letter dated 15.03.2018 is <b>not valid</b> and <b>deserves</b> to be <b>rejected</b> .																																				
iv. Authority found that the <b>respondent</b> has <b>not contravened</b> the provisions of <b>section 171</b> of the CGST Act, 2017 and accordingly <b>no merit</b> was found in the <b>application</b> and <b>dismissed</b> the same.																																				
d. <b>Ratio:</b>																																				
i. Total incidence of tax in pre-GST and during GST regime is as follows:																																				
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The phrase " <b>post-GST Rate (%)</b> " may not be appropriate, as we are currently in GST regime. Reduction in rate of tax is marginal, at around 2.254%, as calculated above and not 51%, as alleged by the Applicant.																																				
ii. Comparison of ex-show room price of the car purchased by the Applicant during pre-GST and in GST regime is as follows:																																				
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CST @ 0.05%	<b>D=C*.05%</b>	378	
Freight and Transit Insurance	<b>E</b>	4573	4,368
Dealer Landed Price	<b>F</b>	7,60,530	6,63,086
Dealer Margin	<b>G</b>	33,619	33,619
Dealer Price	<b>H</b>	7,94,149	6,96,705
VAT @14.5%	<b>I</b>	1,15,152	
GST + Cess @29%	<b>J</b>		2,02,044
Ex-showroom price of Alabaster Silver colour car	<b>K=H+M/N</b>	9,09,300	8,98,750
Additional cost of Orchid White colour car	<b>L</b>	4,000	
Ex-showroom price of Orchid white colour car	<b>M</b>	9,13,300	
Price charged from the Applicant	<b>N</b>		8,98,750
Benefit passed on to the applicant (excluding ₹4,000/- reduced for change in colour)	<b>O</b>		<b>10,550</b>

Thus a reduction of ₹ 10,550/- has been passed on to the Applicant on account of reduction in rate of tax (GST).

**Points to note from the Order:**

- Dealer's margin tantamount to profit of the dealer and the reduction in dealer's margin is reduction in profit margin of the dealer and cannot be equated with commensurate reduction in price due to reduction in rate of tax. (Para 7)
- In the order of the Authority, the word "commensurate" hasn't prefixed before the word "reduction". Relevant portion of the extract is reproduced as "Thus, the **benefit of reduction in the tax rate was passed on to the applicant by way of reduction in the price of the car of base colour by an amount of ₹ 10,550/-**". (Para 15).
- Issue no (ii) wasn't raised by the Applicant in its initial application dated 01.11.2017, but was mentioned in his reply dated 15.03.2018, in response to DGSG's investigation report dated 24.02.2018, which the Authority has accepted for consideration. Was it simply an **omission** or in the **absence** of a **proper mechanism to identify the quantum of benefit of reduction**, the word "**commensurate**" was not mentioned?

Sl. No	Name of the parties	Citation	Date of the Judgement
2	Kumar Gandharv (Applicant) Vs KRBL Ltd (Respondent).	2018 (5) Tmi 760 - National Anti-Profiteering Authority	04.05.2018

**Summary of Case No. 3/2018:**

**a. Facts**

- KRBL Ltd., being the manufacturer of "India Gate Basmati Rice", sold 10 kg packet of "India Gate Basmati Rice" (Mini Mogra), herein after stated as product, at a MRP of ₹ 540/- and ₹ 585/- in the month of August, 2017 and October, 2017, respectively.
- The product wasn't subjected to tax in pre-GST regime, was brought under the net of tax in GST regime w.e.f 22.09.2017 when tax (GST) @5% was levied.
- Respondent was thus became eligible to avail of input tax credit (ITC) w.e.f the same date.
- Applicant vide his application dated 27.11.2017, sent through e-mail to the Standing Committee alleged that the benefit of reduction in the rate of tax on the product has not been passed on to the consumers as its Maximum Retail Price (MRP) had been increased.
- Standing Committee examined the application and forwarded to the Director General Safeguards (DGSG) for detailed investigation on 18.12.2017.

**b. Issue**

- Whether on becoming eligible to avail of the benefit of input tax credit (ITC) on "India Gate Basmati Rice", benefit of input tax credit (ITC) has been passed on to the customers in view of increase in MRP of 10 kg packet of "India Gate Basmati Rice"?

**c. Decision**

- No **net benefit of ITC is available** to the respondent which could be **passed on** to the customers. Accordingly the Authority **didn't find any substance** in the application filed by the Applicant as there is **no violation** of the provisions of section 171 of the CGST Act, 2017 and hence the same is **dismissed**.

**d. Ratio**

- "India Gate Basmati Rice", on becoming taxable product, benefit of input tax credit was made available to the Respondent w.e.f 22.09.2017.
- It was further revealed from the data submitted for three months, i.e, September, October and November, 2017 that input tax credit (ITC) available as a percentage of total value of taxable supplies during these three months varied between 2.69% to 3%, whereas the GST rate on outward taxable supply was 5%.

- iii. Thus ITC available was insufficient to discharge GST liability, and the balance amount had been paid in cash.
- iv. Cost of price of paddy, which amounts to 75% cost of production, has increased by more than 30% in the FY 2017 as compared to the FY 2016.
- v. The Respondent submitted that because of the stiff competition in the market, they couldn't pass on the increased cost entirely to the consumer, instead increased Maximum Retail Price 'MRP' by 8% only from ₹ 540/- to ₹ 585/-.
- vi. Therefore, the Authority didn't find any reason to treat the price fixed by the respondent as a violation of section 171 of the CGST Act 2017, i.e, Anti-profiteering clause.

**Points to note from the Order:**

- i. Concept of '**net benefit of ITC**' or '**net ITC**' was brought in to **measure** whether the increase in MRP was in contravention of Anti-profiteering clause.
- ii. The phrase '**net ITC**' has **not been used** in the CGST Act, but has been used in CGST Rules, 2017 under '**Refund Chapter**'. The phrase '**Net ITC available**' has been used in '**FORM GSTR-3B**' which equals to ITC available as reduced by ITC reversed.
- iii. Adopting the analogy applied in the case, and assuming a scenario where the **arithmetic ratio of 'available input tax credit (ITC) to outward taxable supply' is greater than 5**, i.e, the rate of tax (GST) applicable for outward tax liability in this case, **would it have been considered as commensurate reduction had the excess amount of ITC over and above 5% been passed on to the consumers in the form of reducing MRP of the product.**
- iv. Arithmetic ratio > 5 can also arise in case of inverted duty structure, and the supplier is eligible to claim refund of the excess amount.

Sl. No	Name of the parties	Citation	Date of the Judgement
3	M/S Abel Space Solutions LLP ( <b>Applicant</b> ) Vs M/s Schindler India Private Limited ( <b>Respondent</b> )	2018 (6) Tmi 687 - The National Anti Profiteering Authority	31.05.2018

**Summary of Case No. 4/2018:**

**a. Facts**

- i. An application, dated 20.09.2017, was filed before the Standing Committee on 20.09.2017.
- ii. Applicant had placed orders for supply of two lifts in December, 2016. First lift was delivered, against which full payment was also made during pre-GST regime.
- iii. The issue is related to the second lift. The material was despatched to the Applicant on 29.03.2017. An advance was paid to the Respondent against invoice dated 28.06.2017, on which Service Tax was charged. **Installation was done on 27.07.2017**, i.e, in GST regime, when two more invoices were raised by the Respondent with tax (GST).

**b. Issue**

- i. It has been alleged by the Applicant that the tax (GST) has been charged without excluding the pre-GST regime Excise Duty amount on the material and hence the Respondent had charged tax twice.

**c. Decision**

- i. Based on the given facts, no substance was found in the claim filed by the Applicant and thus hereby orders dropping of the present proceedings as no violation of the provisions of section 171 of the CGST Act, 2017 has been established.

**d. Ratio**

- i. The Applicant had paid advance for purchase of the second lift and the Respondent had charged Service Tax which was leviable in pre-GST regime.
- ii. Supply and installation of lift amounted to "**Works Contract**" and as per Rule 2A of the Service Tax (Determination of Value) Rules, 2006, value of the service portion of the works contract was to be taken as equivalent to the gross amount charged for the works contract minus the value of property in goods transferred in the execution of the said contract and on the goods transferred Value Added Tax (VAT) was to be charged and on the service portion, Service Tax was leviable.
- iii. Explanation to Rule 3 of Point of Taxation Rules, 201, wherever any advance was received by the service provider against the taxable service, the point of taxation was to be construed as the date of receipt of such advance.
- iv. Installation of elevator was completed in the GST regime, and hence the point for levy of tax for supply of material fell under the GST regime and accordingly, two more invoices were issued on 27.07.2017 wherein the applicable GST was correctly charged.
- v. Respondent could have passed on the benefit of Excise Duty if the material was despatched on or after 01.07.2017 and since all the materials were delivered before 30.06.2017 and hence, he was not in a position to pass such benefit to the Applicant.

**Points to note from the Order:**

- i. GST is a new law. Applicant not being able to understand the provisions clearly, filed the application. Later on the Applicant being satisfied with the reply of the Respondent, requested DGSG to consider his application as withdrawn.
- ii. The application was considered as dropped by the Authority and not by DGSG.
- iii. An application, once filed, would move up to the level of Authority for final decision.

Sl. No	Name of the parties	Citation	Date of the Judgement
4	Sh. Rishi Gupta ( <b>Applicant</b> ) Vs M/s. Flipkart Internet Pvt. Ltd ( <b>Respondent</b> )	2018 (7) Tmi 1490 - National Anti-Profiteering Authority	18.07.2018

**Summary of Case No. 5/2018:**

**a. Facts**

- An application dated 11.01.2018 was filed by the Applicant before the Standing Committee.
- Applicant ordered a Godrej Interio Slimline Metal Almirah **through** the Respondent vide his order no. 110666745976477000 on 04.11.2017 and a tax invoice dated 07.11.2017 was issued to him for an amount of ₹ 14,852/- by M/s. Godrej & Boyce Mfg. Co. Ltd., Mumbai (herein after referred as Supplier).
- Rate of tax (GST) has been reduced by the Government of India on 14.11.2017 from 28% to 18%.
- Another invoice dated 29.11.2017, at the time of delivery, was issued by the Supplier for an amount of ₹ 14,152/-.
- Respondent vide his letter dated 27.04.2018, intimated that excess amount of ₹ 700/- was refunded to the Applicant on 18.01.2018.

**b. Issues**

- Excess amount charged earlier should have been refunded to the Applicant, and
- Respondent by not refunding the excess amount collected, has resorted to profiteering.

**c. Decision**

- Respondent was not the Supplier / Manufacturer of the Almirah, was only an **agent** who had offered his platform, i.e, a market place to the Supplier to sell the Almirah by charging commission, and was also not responsible for collection or refund of tax (GST). Hence, he cannot be held accountable for contravention of section 171 of the CGST Act, 2017.
- Allegation of profiteering made by the Applicant against the Respondent as well as Supplier is not established and hence the present application is not maintainable and the same is dismissed.
- As there may be several cases, where e-platforms have collected excess tax (GST) at the time of booking which are required to be refunded. Therefore, the Authority has already directed the Director General of Audit, Central Board of Indirect Taxes and Customs vide letter No. NAA/2018/DO/08/2011 dated 24.05.2018 to audit the major e-platforms and submit it's findings to the Authority.

**d. Ratio**

- The Respondent, being an agent, offered a market place which enabled the sellers to offer their products for direct sale to the customers for which it was charging commission.
- Sellers were entirely responsible
- Base price i.e, ₹ 11,993.75/-, was not changed by the Supplier either before or after the rate of change of tax.

Particulars	Break up of invoice dt. 07.11.2017	Particulars	Break up of invoice dt. 29.11.2017	Remarks	
				Particulars	(Latest price – earlier price) (₹)
Base price	11,993.75	Base price	11,993.87	Base price	-
GST @ 28%	3,358.25	GST @ 18%	2,158.87	GST	-1,199.38
Gross price	15,352.00	Gross price	14,152.74	Gross price	-1,199.38
Discount	500.00	Discount	-		-500.00
Invoice amount (GP – discount)	14,852.00	Invoice amount	14,152.74	Invoice amount	-700.00

- ₹ 700/- was refunded to the Applicant by the Supplier on 18.01.2018.
- Withdrawal of discount of ₹ 500/- by the Supplier vide his invoice dated 29.11.2017 did not amount to profiteering as discount was given by the Manufacturer supplier out of profit margin.

**Points to note from the Order:**

- Trade discount** is part of the trade margin of the Supplier, and **withdrawal of the trade discount doesn't amount to profiteering.**
- As **base price** hasn't changed, profiteering cannot be invoked. Although the phrase "base price" hasn't been defined in the law, it appears to be 'taxable value' of the product under reference.
- Authority can **suo moto initiate** action to **ensure that benefits are passed on to every recipient.**

Sl. No	Name of the parties	Citation	Date of the Judgement
5	Shri Pawan Sharma C/O Kalptaru Departmental & General Stores ( <b>Applicant no 1</b> ), Director General Anti-Profiteering, Indirect Taxes & Customs ( <b>Applicant no 2</b> ) Vs M/S Sharma Trading Company ( <b>Respondent</b> )	2018 (9) Tmi 625 - The National Anti-Profiteering Authority	07.09.2018

**Summary of Case No. 6/2018:**

**a. Facts**

- i. Applicant No. 1 was a distributor and stockist of M/s. Hindustan Unilever Limited (Manufacturer supplier).
- ii. Applicant No. 1 had bought **Vaseline VTM 400ml** on **26.09.2017** at **₹213.63/- per unit** vide tax invoice No. GSA25066 when **tax (GST) rate** was **28%**, and **20 units of Vaseline VTM 400ml** on **15.11.2017** at **₹213.63/- per unit** vide tax invoice No. GSA37782 when the **tax (GST) rate** was **reduced to 18%** on this product vide **Notification No. 41/2017 – Central Tax (Rate)** dated **14.11.2017**.
- iii. An application dated 22.11.2017 was filed by the Applicant No. 1 before the Standing Committee of Anti-Profiteering that the Respondent had indulged in profiteering in contravention of section 171 of the CGST Act, 2017 as the price of Vaseline VTM 400 ml was not reduced.
- iv. The application was referred by the Standing Committee of Anti-Profiteering to Director General of Anti-Profiteering (DGAP) for detailed investigation.
- v. DGAP asked the **Respondent to suo moto determine** the **quantum of benefit** which he had not passed on after the reduction in the rate of tax.
- vi. **20 units of Vaseline VTM 400ml** were **returned** by the Applicant No. 1 to the Supplier vide **Goods Return invoice No. 534 dated 15.12.2017** against which **CN No. AA021330** was issued by the **Supplier on 23.12.2017**.
- vii. Manufacturer supplier runs various Consumer Promotion Schemes (**CPS**) during the lean period by offering **additional quantity** or **along with some additional products**.
- viii. Additional quantity was offered in September, 2017 which was also in offering in November, 2017, when **MRP** was **retained at ₹235/- for 400 ml** i.e, **additional 100 ml** was **offered** along with **300 ml of Vaseline VTM**.
- ix. **MRP** was **reduced** from **₹235/-** to **₹233/-** w.e.f **13.12.2017**.
- x. Respondent claims to be an intermediary in the supply chain.

**b. Issues**

- i. Section 171 of the CGST Act, 2017 did not provide for any methodology for determining the commensurate reduction in the prices.
- ii. It was alleged that the Respondent had not passed on the benefit of reduction in the rate of tax by lowering the price of Vaseline VTM 400 ml, and indulged in profiteering in contravention of the provisions of Section 171 of the CGST Act, 2017.

**c. Decision**

- i. The argument advanced by the Respondent appears to be frivolous as it involves only mathematical calculation of the amount by which the tax had been reduced i.e by 10% and after subtracting the same from the existing Maximum Retail Price (MRP), the MRP was to be re-fixed as per the provisions of the Legal Metrology (Packaged Commodities) Rules, 2011. It was also mandatory for the Respondent to declare the reduced MRP by affixing additional sticker or stamping or online printing as per letter No. WM-10(31)/2017 dated 16.11.2017 issued by the Ministry of Consumer Affairs, Food and Public Distribution.
- ii. Base price of Vaseline VTM 400 ml was increased by the Respondent exactly by the same amount by which the tax had been reduced. He was legally bound not to charge the enhanced base price and cannot escape his accountability of passing on the benefit of the reduction in the rate of tax to his customers. Allegation of profiteering has been duly established against him. Accordingly, the Respondent was directed to reduce the sale price of the product immediately commensurate to the reduction in the rate of tax as was notified on 14.11.2017 and pass on the benefit of reduction in the rate of the tax to his customers. Penalty is imposable.

**d. Ratio**

- i. Increase in base price of the product is as follows:

Particulars	Break up of price per unit when GST was 28% (₹)	Particulars	Break up of price per unit when GST was 18% (₹)	Remarks	
				Particulars	(Latest price – earlier price) (₹)
Base price	158.66	Base price	172.77	<b>Increase in base price</b>	<b>14.11</b>
GST @ 28%	44.42	GST @ 18%	31.10	GST	-13.32
Margin	10.55	Margin	9.77	Margin	-0.78
Per unit price	213.63	Per unit price	213.64	Per unit price	0.01

**Points to note from the Order:**

- i. **Additional quantity** offered to the customer, culminating in to reduction of per unit price i.e (herein ₹ per gram), was **not considered** by the Authority **as commensurate reduction in price** in terms of section 171 of the CGST Act, 2017.

Sl. No	Name of the parties	Citation	Date of the Judgement
6	Shri Sukhbir Rohilla along with 108 other Applicants <b>(collectively as 1<sup>st</sup> Applicants)</b> . & Director General Anti-Profitteering, Indirect Taxes & Customs <b>(2<sup>nd</sup> Applicant)</b> Vs M/s Pyramid Infratech Pvt. Ltd <b>(Respondent)</b> .		18.09.2018

**Summary of Case No. 7/2018:****a. Facts**

- Two projects viz. (1) Urban Homes, Sector 70A, Gurugram, and Urban Homes, Sector-86, Gurugram are being executed by the Respondent.
- Several applications were filed with the Haryana Screening Committee for appropriate redressal of their grievance. Applications were examined by the Screening Committee who decided to forward these applications to Standing Committee of Anti-Profitteering for further necessary action.
- Standing Committee confirmed that there was prima facie evidence of non compliance and forwarded these applications to now redesignated as Director General of Anti-Profitteering (DGAP) for detailed investigation.
- DGAP issued a notice to the Respondent to submit his reply in response to the allegations and to **suo moto declare** the amount of profiteering.
- Applicants booked flats under the Haryana Affordable Housing Policy, 2013.
- Payment was not linked to completion of construction mile stone based, instead was time based payment schedule.
- In pre-GST regime Service Tax was exempted and only VAT @5.25% was leviable for the project.
- In GST regime, rate of tax (GST) was 12% w.e.f 01.07.2017 and was reduced to 8% w.e.f 25.01.2018.
- Applicants alleged that benefit of input tax credit (ITC) which was available is much more than the output tax liability of the respondent.

**b. Issues**

- Whether there was any violation of the provisions of Section 171 of the CGST Act, 2017 in this case?
- If yes then what was the quantum of profiteering?.

**c. Decision**

- Excess ITC** was **available** to the **Respondent** the **benefit** of which he was **required to pass** on to the Applicants. The Respondent **cannot appropriate** this benefit as this is a concession given by the Government from it's own tax revenue to reduce the prices being charged by the builders from the vulnerable section of society which cannot afford high value apartments. The Respondent is not being asked to extend this benefit out of his own account and he **is only liable to pass on the benefit of ITC to which** he has **become entitled by virtue** of the **grant of ITC** on the **Construction Service** by the Government.
- It is **held** that the Respondent has **profiteered** an amount of **₹8,22,80,998/-**
- Profiteered amount is to be refunded to the Applicants along with interest @18% who have applied and also to those Applicants who have not applied as they are identifiable.

**d. Ratio**

- ITC ratio to Taxable Value in terms of % during pre-GST regime was 1.1%, whereas the same in GST regime is 7.2%. Thus **additional ITC availed** in terms of % of taxable supplies was **6.1%**.

**Points to note from the Order:**

- Concept of 'net benefit of ITC' was brought in to measure commensurate reduction in prices.
- Benefits are also to be passed on to Applicants who have not preferred application but are identifiable. In such cases, the amount along with interest is not required to be deposited with CWF.
- Increase in cost (herein primarily cost of steel) cannot be utilised in setting off the benefit of ITC as cost od escalation of price was factored in during fixing maximum per square feet rate.

Sl. No	Name of the parties	Citation	Date of the Judgement
7	Miss Neeru Varshney <b>(Applicant No. 1)</b> and Director General Anti-Profitteering <b>(Applicant No. 2)</b> Vs M/s Lifestyle International Pvt. Ltd. <b>(Respondent)</b>	2018 (9) Tmi 1640 - National Anti-Profitteering Authority	25.09.2018

**Summary of Case No. 8/2018:****a. Facts**

- An application dated 23.11.2017 was filed by the Applicant No. 1 before the Standing Committee.
- Applicant No. 1 had bought "**Maybelline FIT Me foundation**" (here-in-after referred to as the product) from the Respondent **@ ₹525/- per unit** vide tax invoice no. 1230010554 on 22.11.2017 which included GST @ 18%.
- Standing Committee examined the above application, and referred to DGAP for detailed investigation.

- iv. DGAP had called upon the Respondent to submit his reply on allegation levelled by the Applicant No. 1 and also to **suo moto determine** the quantum of benefit which had not been passed on to its buyers during the period between 15.11.2017 to 31.01.2018.
- v. Respondent was registered in different States and / or UTs, and thus maintained 24 GSTINs. Respondent further claimed that during the period between November, 2017 to January, 2018, he had given discount of 11.66% on the MRP which was more than what he was required to pass on consequent to the reduction in the rate of tax w.e.f 15.11.2017.
- vi. DGAP has further stated that the Respondent had sold **485 units of another shade** of the **product** between 01.11.2017 to 14.11.2017, in which **basic price per unit** was **increased** from **₹449/-** to **₹487/-** on which **GST** at a rate of **18%** was charged resulting no change in **MRP at ₹575/- per unit**.

**b. Issue**

- i. The Respondent had not passed on the benefit of reduction in the rate of tax by lowering the price of "Maybelline FIT Me foundation".

**c. Decision**

- i. Every citizen who is a recipient of supply of goods or services **has to get the benefit** and hence this **benefit** has to be **calculated on each and every product**. The Respondent has **no discretion to provide benefit on certain class of products** and **deny the same** in respect of the **other products**. Denial of the benefit as per the convenience of the Respondent is not permissible as it is hit by the provisions of section 171 of the CGST Act, 2017.
- ii. Respondent has **failed to reduce** base price due to reduction in tax (GST) and had **issued incorrect invoices** which is established.
- iii. Respondent is **directed** that to **reduce the price** of both the shades of the product to ₹ 410/- and ₹ 449/- respectively excluding GST. He is directed to **refund ₹ 41/-** along **with interest @ 18%** to the Applicant No. 1 from the date when this amount was realised by him from her till the date of refund. Since rest of the recipients are not identifiable the DGAP is directed to get the balance amount of profiteering of ₹ 15,820/- deposited in the Consumer Welfare Fund of the Central and the Concerned State Govt. as per provisions of law along with interest @ 18% till the amount is paid.
- iv. To **issue notice** to the Respondent to **show cause** as to why **penalty** as per provisions of Section 122 of the CGST Act, 2017 read with Rule 133 (3) (d) of the CGST Rules, should not be **imposed upon him**.
- v. The DGAP is directed to **investigate** the **claim** made by the **Respondent** in para no 27 that an amount of ₹ 1,98,46,438/- **might not have been passed** on to the individual buyers by him and **submit Report to the Authority** under Rule 129(6) of the above Rules..

**d. Ratio**

- i. Increase in per unit base price when **MRP was ₹550/-**:

Particulars	Break up of price per unit when GST was 28% (₹)	Particulars	Break up of price per unit when GST was 18% (₹) with same base price	Remarks	
				Particulars	(Latest price – earlier price) (₹)
Base price	410.00	Base price	410.00	Increase in base price	-
GST @ 28%	114.80	GST @ 18%	73.80	Reduction in GST	41.00
RSP unit price	525	RSP unit price	484	<b>Profit per unit price</b>	<b>41.00</b>

- ii. Increase in per unit base price whose **MRP was ₹575/-**:

Particulars	Break up of price per unit when GST was 28% (₹)	Particulars	Break up of price per unit when GST was 18% (₹) with same base price	Remarks	
				Particulars	(Latest price – earlier price) (₹)
Base price	449.00	Base price	449.00	Increase in base price	-
GST @ 28%	125.72	GST @ 18%	80.82	Reduction in GST	44.90
MRP unit price	575	RSP unit price	530	<b>Profit per unit price</b>	<b>45</b>

Thus it is evident that the per unit profiteering amount is exactly equals to the amount by which tax (GST) has been reduced.

**Points to note from the Order:**

- i. **Benefit** has to be **passed on** in respect of **each product** separately. The **effect of benefit** cannot be **calculated as a whole** for the purpose of passing off.
- ii. A taxable person (Respondent in this case) cannot be given liberty to decide which areas he should pass on the benefit and which areas he should not. Thus **every citizen** who is a **recipient of supply** of goods or services **has to get the benefit**.
- iii. Authority has the **power to extend jurisdiction** i.e the scope of investigation to pan India registrations and to **include**



other complainant / recipient, product or dealer etc.

- iv. Any **discount offered** by a taxable person (Respondent in this case) on the **product** can also **not to be taken** to have been **given in lieu of the reduction** in the **rate of tax** as such discounts are regular trade practices. Reduction in prices in general amounts to insufficient compliance.
- v. Law of averages cannot be applied when benefit is to be given to each and every customer.
- vi. In case operating expenses have increased, a taxable person (Respondent in this case) cannot be allowed to top up his margins from the amount of tax reduction.

Sl. No	Name of the parties	Citation	Date of the Judgement
8	Sh. Jijrushu N Bhattacharya ( <b>Applicant No.1</b> ) & Director General Anti-Profitteering ( <b>Applicant No. 2</b> ) Vs M/s. NP Foods (Franchisee M/s Subway India), ( <b>Respondent</b> )	2018 (9) Tmi 1763 - National Anti-Profitteering Authority	29.09.2018

**Summary of Case No.9/2018:**

**a. Facts**

- i. Respondent is a franchisee of M/s Subway India, and is free to buy raw material, fix sell price. Franchisor is entitled to royalty on the net turnover.
- ii. The Applicant purchased 6 Hara Bhara Kabab Sub on 14.11.2017 from the Respondent.
- iii. GST rate in restaurant service was reduced from 18% to 5% without input tax credit (ITC) from 15.11.2017.
- iv. Effect of denial of ITC was 11.80%, and Respondent increased base prices ranging from 6% to 17% of the different items, i.e, increase in average base prices by 12.14% to neutralize the effect of denial of ITC.

**b. Issues**

- i. Whether there was reduction in the rate of tax on the restaurant service after 14.11.2017 and whether the benefit as emanating from such reduced tax rate has not been passed to the Applicant No. 1 in terms of the commensurate reduction in the price of the product purchased by him?
- ii. Whether profiteering of ₹ 452/- was made by the Respondent y selling 32 numbers of items on 14.11.2017 in Karelibaug outlet at increased base price?

**c. Decision**

The allegation of not passing on the benefit on rate reduction is not established against the Respondent. There is no merit in the application filed by the Applicant No. 1 and the same is accordingly dismissed.

**d. Ratio**

- i. Respondent had increased the base price of his products to make good loss which had occurred due to of ITC post GST rate reduction.
- ii. There was no reduction of rate of tax (GST) on 14.11.2017.

**Points to note from the Order:**

- i. Increased in percentage of average price was compared with effect of denial of ITC to justify the increase.

Sl. No	Name of the parties	Citation	Date of the Judgement
9	Shri Ankur Jain ( <b>Applicant No. 1</b> ) & Director General Anti-Profitteering, Central Board of Indirect Taxes & Customs ( <b>Applicant No. 2</b> ) Vs M/s Kunj Lub Marketing Pvt. Ltd ( <b>Respondent</b> )	2018 (9) Tmi 1763 - National Anti-Profitteering Authority	08-10-2018

**Summary of Case No. 10/2018:**

**a. Facts**

- i. Applicant No. 1 was a retailer, doing business in the name and style of M/s. Anil Kumar Jain & Sons and to whom the Respondent had been selling Nestle's products.
- ii. An application through email dated 29.11.2017 was filed before the Standing Committee on Anti-Profitteering by Applicant No. 1.
- iii. The application was examined by the Standing Committee on Anti-Profitteering in it's meeting held on 20.12.2017, where it was decided to refer the matter to the Director General of Safeguards (DGSG), now re-designated as Director General of Anti-Profitteering (DGAP), for further investigation.
- iv. Respondent was asked to **suo-moto determine** the quantum of benefit not passed on.
- v. Applicant No.1 stated to have purchased Maggi Noodle packs, each weighing 35 Gms., having Maximum Retail Price (MRP) of ₹ 5/- from the Respondent on 06.11.2017 vide invoice No. N1611 and on 28.11.2017 vide invoice No. N1867.
- vi. Respondent was alleged to have charged base price of ₹ 3.96 per packet with tax (GST) @ 18% on it and increased base price to ₹ 4.17 per packet when tax (GST) was reduced to 12% so that cum-tax price remains unchanged at ₹ 4.67/- per packet.
- vii. Respondent had claimed to have passed on the benefit of GST rate reduction in respect of the product bearing MRP of ₹ 5/- through other packs of Maggi Noodles having different grammage (Maggi Noodles pack of 70 Gms. Bearing MRP of ₹

12/- per pack).

viii. Respondent further claims that benefit passed on was more than what it would have required to be passed on and the benefit of GST rate reduction had been passed on in respect of Maggie Noodles as a whole.

**b. Issues**

- i. Whether the benefit accrued due to reduction in the rate of tax of one product can be passed on via another product or not?
- ii. Whether there was any violation on the provisions of Section 171 of the CGST Act, 2017 in this case?
- iii. If yes then what was the quantum of profiteering?

**c. Decision**

- i. The Respondent has contended that he had passed on the benefit in respect of the product by way of reducing the MRP of the 70 Gms. products. The Respondent has **no such liberty to arbitrarily decide in respect of which products he would pass on the benefit and in respect of which products he would not pass such benefit.** As per the provisions of Section 171 of the Act, the **benefit** has to be **passed on to each recipient** and the same **cannot be selectively granted or denied** as Maggi Noodle pack of **35 Gms is distinct** from from a **70 Gms pack** and both the packs may be **bought by the different recipients /customers.** Hence the **benefit accruing** to one customer **cannot be given or denied to another** nor can the benefit given to one set of customers arbitrarily enhanced and set off against the another. **No such adjustments are permissible under the Act.**
- ii. The Respondent has resorted to **profiteering of Re. 0.24/- per pack.** It is beyond doubt that the benefit of reduction in the GST rate **was not passed** on to the recipients by way of commensurate reduction in the price charged by the Respondent which amounts to of the provisions of Section 171 of the CGST Act, 2017.
- iii. Quantum of profiteering is determined as ₹ 90,778/- including the profiteering of ₹ 2,253/- made by the Respondent from Applicant No. . Accordingly he is directed to refund an amount of ₹ 2,253/- to the Applicant No.1 along with interest @18% p.a and is hereby directed to deposit the balance amount of ₹ 88,525/- along with interest at 18% p.a till the date of deposit in the respective Central or State Consumer Welfare Fund.
- iv. The Respondent has realised more price from the consumers than the price he is entitled to and compelled them to pay more GST than they are required to pay by issuing incorrect invoices and hence committed offence under section 122 (1) (i) of the CGST Act, 2017 and therefore he is liable to for imposition of penalty. Accordingly, a Show Cause Notice be issued to the Respondent directing him to explain as to why the penalty prescribed under Section 122 of the above Act read with rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on him.

**d. Ratio**

- i. Calculation of increase in base price in respect of **Maggi Noodle packs, each weighing 35 Gms.**

Particulars	Break up of price per unit when GST was 18%, invoice no N1611 dated 06.11.2017 (₹)	Particulars	Break up of price per unit when GST was 12%, invoice no N1867 dated 28.11.2017 (₹)	Remarks	
				Particulars	(Latest price – earlier price) (₹)
Base price	3.96	Base price	4.17	<b>Increase in base price</b>	<b>0.21</b>
GST @ 18%	1.06	GST @ 12%	0.83	-	-
MRP unit price	5.00	MRP unit price	5.00	Profit per unit price	-

**Points to note from the Order:**

- i. **Benefit** has to be **passed on** in respect of **each product** separately. The **effect of benefit** cannot be **calculated as a whole** for the purpose of passing off.
- ii. **Discount** given against **one product** cannot be **adjusted against another product** in respect of which benefit of reduction of tax was to be passed on.

## Conclusion:

- i. It seems that there exists confusion regarding identifying “commensurate reduction” to prices which eventually culminates into profiteering in GST regime.
- ii. The word “commensurate” has been defined in Cambridge dictionary to mean as “in a correct and suitable amount compared to something else”.
- iii. As the word “commensurate” has been used and not “equivalent”, thereby intention of the law is not to take the overall facts and circumstances into consideration to decide whether profiteering has been done or not.
- iv. Essentially there is no objection to profit in business but objection to profiteering out of the two reasons stated in the GST law.
- v. In many a cases DGSG / DGAP has asked the Respondents to **suo moto determine** the benefits of reduction of tax.
- vi. **The author of the article is personally of the view that if cost records were maintained by all the Respondents, increase in costs and other factors, as discussed supra, could easily be identified there from. “Authority” may also consider to prescribe a “format” for reporting figures which would be unique to all or at least a “format” for suppliers of goods and a “format” for suppliers of services to maintain uniformity. Thus section 148 of the Companies Act, 2013 may suitably be amended.**
- vii. **This will ease the task of the taxable persons to calculate how much benefits have been accrued to them.**
- viii. **Elongated supply chain spanning across manufactures, distributors, retailers, etc make it difficult for manufacturer to ensure that the benefits of rate reductions are passed on at every stage so as to reach the end consumers, more particularly with respect to pipeline stock as on the date of reduction of tax.**
- ix. M/s. Pyramid Infratech Pvt. Ltd is reported to have filed a writ petition against the order in Delhi High Court alleging that the **Anti-Profiteering mechanism lacks clarity.**
- x. Plenty of **issues** have been **addressed through the Orders**, discussed supra, many of them have been **pointed out** in this **article** under the heading **“points to note from the order”**, which appears to have been raised by the Respondents as those were not **specifically mentioned** in the law.
- xi. Thus Government of India may consider to publish clarification to diffuse confusion in the form of either “Notifications” or “Circulars” clarifying the points mentioned against each order, as discussed supra, along with any other clarifications as deems fit.

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